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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1404**

In the Matter of the Welfare of the Child of:
T. A. V. G., Parent.

**Filed May 10, 2021
Affirmed
Smith, Tracy M., Judge**

Clay County District Court
File No. 14-JV-20-1755

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Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

On appeal from the termination of his parental rights (TPR), appellant T.A.V.G. (father) argues that (1) the district court improperly relied on the testimony of a required expert witness, (2) respondent Clay County Social Services (CCSS) did not make active efforts to reunite him with his daughter (child), (3) the statutory bases for termination found

by the district court were not proved beyond a reasonable doubt, and (4) termination was not in child's best interests. We affirm.

FACTS

Child was born in December 2017, and father signed a recognition of parentage following her birth. Child is enrolled as an associate member of the Fort Peck Assiniboine Tribe. The Indian Child Welfare Act (ICWA) and Minnesota Indian Family Preservation Act (MIFPA) therefore apply to this case. As an associate member of the Tribe, child has limited tribal rights. She is not placed on the reservation and is not eligible for services through the Tribe.

In August 2018, Cass County, North Dakota, social services removed child from her mother and placed her in out-of-home care through court order. At the time of removal, child required ongoing medical care for several conditions. Father was unavailable to care for child because he was hospitalized for methadone use. Child's case was transferred to CCSS in Moorhead in September 2018. The circumstances of father's hospitalization led CCSS to suspect that father had chemical-dependency issues.

In December 2019, after searching for an appropriate family member to care for child, CCSS placed child in the care of father's sister in Langdon, North Dakota. The Tribe approved of this placement. Langdon is a three-hour trip, one-way, from father's home in Moorhead.

Beginning around April 2019, father was on supervised probation for a domestic-violence conviction. The conviction resulted from an incident that took place between

father and mother after child was removed from their care.¹ As part of his probation, father was required to complete domestic-violence counseling, abstain from drugs and alcohol, submit to random drug testing, and remain law-abiding for two years.

CCSS petitioned to terminate father's and mother's parental rights. Following a trial in January 2020, the district court granted the petition to terminate mother's parental rights but denied the petition to terminate father's, finding that CCSS had not made active efforts to reunite father with child.

Two weeks after the district court denied CCSS's initial TPR petition, CCSS communicated to the Tribe that it intended to file another petition to terminate father's parental rights. Before it filed its second TPR petition, CCSS offered services to father according to father's case plan, including parenting-skills training, anger-management classes, domestic-violence classes, coordinating visits with child, providing travel or travel reimbursement for visits, providing a chemical-dependency evaluation, helping father obtain housing, monitoring father's mental health, and providing in-home family therapy. Father's case plan also required father to remain compliant with the terms of his probation.

¹ A significant point of contention between father and CCSS was the case worker's initial belief that father's domestic-violence conviction was the reason that child was removed from his care. Two witnesses at the TPR trial generating this appeal testified that CCSS told them that child was removed due to domestic violence. But child was not removed due to domestic violence; she was removed due to neglect. The district court acknowledged this inaccuracy in the testimony of those witnesses but determined that there was no basis to believe that the case worker intentionally spread misinformation about the connection between father's domestic-violence conviction and child's removal. The district court determined that this misinformation was "immaterial to the resolution of issues in this case."

CCSS ultimately filed a second TPR petition in May 2020, and father was served with the petition in July 2020. The district court held a trial on the second petition in October 2020. The district court heard testimony from an in-home family therapist, father, father's probation officer, a Moorhead police officer, the CCSS case worker, a qualified expert witness (QEW), and the guardian ad litem.

The district court granted the TPR petition. It found that CCSS had made active efforts towards reunification and rehabilitation and that, despite these efforts, father was palpably unfit to parent child, the efforts had failed to correct the conditions that led to child's placement in foster care, and child was neglected and in foster care. The district court also determined that continued custody of child by father "is likely to result in serious emotional damage to [child]" and that terminating father's parental rights was in child's best interests.

Father appeals.

DECISION

Generally, the termination of parental rights is governed by chapter 260C of the Minnesota Statutes. *See* Minn. Stat. §§ 260C.001-.637 (2020). But TPR cases involving children who fit the definition of "Indian children" in ICWA or in MIFPA are additionally subject to the requirements of the applicable act or acts. *See* 25 U.S.C. §§ 1901-1923 (2018); Minn. Stat. §§ 260.751-.835 (2020), 260C.001, subds. 2, 3.

We begin by noting that the parties disagree on the standard of review. Father argues that a de novo standard of review applies because he is challenging the district court's interpretation of ICWA. But father has not identified any issue of statutory interpretation;

instead, his arguments challenge the district court’s factual findings and the sufficiency of the evidence to satisfy the statutory criteria for termination. Appellate courts “review the district court’s findings to determine whether they address the statutory criteria for termination of parental rights and are not clearly erroneous.” *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660 (Minn. 2008). “A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *In re Welfare of Children of S.R.K.*, 911 N.W.2d 821, 830 (Minn. 2018) (quotation omitted). “We defer to the district court’s determinations of witness credibility and the weight to be given to the evidence.” *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 555 (Minn. App. 2007).

Father argues that the district court erred by (1) accepting the QEW’s testimony as credible, (2) determining that CCSS engaged in active efforts to reunify him with child, (3) finding that three statutory factors supported termination, and (4) concluding that termination was in child’s best interests. We address each of his arguments in turn.

I. The district court did not err by relying in part on the QEW’s testimony.

Under ICWA and MIFPA, “a court cannot terminate parental rights unless it determines that the evidence shows, beyond a reasonable doubt, that continued parental custody is likely to result in serious emotional or physical damage to the child.” *S.R.K.*, 911 N.W.2d at 829-30. That determination must be supported by the opinion of a QEW. *Id.*; see also 25 U.S.C. § 1912(f); Minn. Stat. § 260.771, subd. 6(a). Relevant to this appeal, a QEW is an individual with “specific knowledge” of the relevant tribe’s culture who

provides required testimony regarding termination of parental rights related to an Indian child. Minn. Stat. § 260.755, subd. 17a.²

Father argues that the district court should have found the QEW's testimony not credible because the QEW was unfamiliar with the case and gave incorrect information about the facts. He does not argue that the district court erred by permitting the QEW to testify as an expert witness.

Appellate courts defer to a district court's assessment of witness credibility. *T.D.*, 731 N.W.2d at 555. Deference is particularly warranted in termination proceedings because "the [district] court's opportunity to observe the parent and other witnesses who are called to testify is so crucial to an accurate evaluation of what is best for the child." *In re Welfare of A.D.*, 535 N.W.2d 643, 648 (Minn. 1995). This deference applies to a district court's evaluation of a QEW's testimony in an ICWA case. *J.B.*, 698 N.W.2d at 167. The weight and credibility of QEW testimony under ICWA is "left to the factfinder." *S.R.K.*, 911 N.W.2d at 831.

Here, the district court acknowledged the shortcomings in the QEW's testimony. It found that she knew the circumstances leading to child's removal and generally what occurred thereafter but that she was unclear as to some facts and circumstances. The district court observed that it was not surprising that the Tribe's QEW, "when put on the spot,"

² We note that this statutory definition of "qualified expert witness" supersedes pre-existing caselaw definitions of "qualified expert witness" to the extent that those pre-existing caselaw definitions are inconsistent with the statutory definition. *See, e.g., In re Welfare of Children of J.B.*, 698 N.W.2d 160, 167 (Minn. App. 2005) (using a pre-statutory definition of "qualified expert witness").

was unable to articulate specific facts given that child was not eligible for services through the Tribe and was located “quite a distance” from the reservation. Nevertheless, the district court found that the QEW “had a good grasp on the general issues at play in this case, and as such, her testimony is both required and helpful.”

We defer to the district court’s determination. Though the QEW did not demonstrate a full knowledge of the facts, including by misstating why child was removed from father’s care, she knew that father had neither complied with his case plan nor cooperated with CCSS. She testified that continued custody of child by father was likely to result in serious physical or emotional damage to child because of father’s failure to complete his treatment plans, his failure to complete his anger-management programming, his lack of cooperation with the social worker, and the young age of child. Thus, the district court’s determination regarding the credibility and weight of the QEW’s testimony finds support in the record. Moreover, a district court’s ultimate conclusion regarding whether to terminate parental rights need only be based in part on the QEW’s testimony, *S.R.K.*, 911 N.W.2d at 829, and the district court’s determination here is supported by other evidence in the record.

II. The district court’s finding that CCSS made active efforts to reunite father with child is not clearly erroneous.

The general rule in TPR cases is that a district court may not terminate parental rights unless the petitioning county proves by clear and convincing evidence that it made reasonable efforts to reunite the parent with the child. Minn. Stat. § 260C.301, subd. 8. But in an ICWA case, a heightened standard applies—the petitioning county must prove beyond a reasonable doubt that it made “active efforts” to provide remedial services and

rehabilitative programs to prevent the breakup of the family. 25 U.S.C. § 1912(d); Minn. Stat. § 260.762, subd. 3; *J.B.*, 698 N.W.2d at 165; *see also* Minn. Stat. § 260.755, subd. 1a. (defining “active efforts”). Father argues that the district court erred by finding that CCSS engaged in active efforts for four reasons, which we address in turn.

First, father argues that CCSS’s efforts were insufficient because in-family therapy services were not held in Langdon, where father’s visits with child took place. The district court determined that CCSS appropriately arranged in-home family services, even if they were not in Langdon. This determination is supported by the record. Child was placed with a relative in Langdon because CCSS was obligated under ICWA to place child with a member of child’s extended family before exploring other options. *See* 25 U.S.C. § 1915(b)(i) (stating that preference is given to the Indian child’s extended family when determining foster placement). CCSS searched for providers, both in North Dakota and in Moorhead, who could provide services in Langdon but encountered long waitlists and other barriers. CCSS then arranged for services in Moorhead if child was brought there for visits. An initial assessment was scheduled for the end of February 2020, but father said that he could not attend because he had accepted a new job. The initial assessment was rescheduled for a day in March 2020, and father attended, but the next day he revoked the in-home therapy release of information. Father continued to refuse to sign releases, so the in-home therapy stopped. In-home therapy was to resume in August 2020, but child’s diagnostic assessment had expired and the provider needed to complete a new assessment of child, further delaying the provision of in-home services. CCSS was not responsible for delays caused by father.

Second, father contends that CCSS told a county housing worker that father had a history of “meth use” and that this prevented him from timely obtaining housing. In its order, the district court determined that it was father’s reluctance to sign an information release allowing the case worker to talk to the county housing authority that delayed his housing placement. This determination is supported by the record. The case worker testified that father signed a release for her to talk to the housing authority but only authorized her to do so for one day. After the housing authority determined that the release was still valid, it put father on the housing waiting list and father moved into his current apartment two months later.

Third, father argues that CCSS did not do enough to arrange visits with child in Langdon, including scheduling nighttime visits. He asserts that the reason he did not attend more visits with child in Langdon is because CCSS would not accommodate his schedule. The record certainly demonstrates the difficulty for father to travel to Langdon to visit child, but it also reflects that CCSS scheduled regular visits and sought to navigate father’s changing schedule. Moreover, father did not provide CCSS with his employment information or mental-health treatment appointments so that his visits with child could be scheduled around father’s existing commitments. CCSS arranged for daytime visits in Langdon, consistent with the schedule for a young child; arranged for virtual visits after the COVID-19 pandemic began; and provided transportation or travel reimbursement for visits. The record supports the district court’s determination that CCSS made active efforts to arrange visits with child.

Finally, father argues that CCSS provided false information to service providers regarding his drug use and domestic-violence conviction, which impeded his ability to obtain services. The district court determined that the incorrect information that was provided was “immaterial to the resolution of this case” and that father should have cleared up the miscommunication with the case worker directly instead of refusing to work with her. The district court’s determination is supported by the record. Nothing in the record indicates that the case worker intentionally spread this misinformation. Moreover, the record contains no evidence that the misinformation prevented father from receiving services.

In sum, each of father’s arguments that the district erred by finding that CCSS engaged in active efforts to reunite him and child fails.

III. The district court did not err by finding that reasonable efforts failed to correct the conditions leading to child’s placement away from father.

Father next argues the district court erred by finding three statutory grounds for terminating his parental rights: (1) that father is palpably unfit to be in a parent-child relationship with child, (2) that reasonable efforts have failed to correct the conditions leading to child’s placement away from father, and (3) that child is neglected and in foster care.³

³ Father argues that the county failed to show that “reasonable efforts” did not correct the conditions leading to the out-of-home placement. We have already affirmed the district court’s determination that the county made “active efforts.” “The active efforts standard [for ICWA cases] provides a higher level of protection than reasonable efforts. Active efforts include reasonable efforts, but reasonable efforts may be found without meeting the threshold for active efforts.” Minn. R. Juv. Prot. P. 28.04, subd. 2. Thus, our determination that the county made “active efforts” necessarily means that those “active efforts” were

To affirm a district court’s termination of parental rights, at least one statutory basis for termination must be supported by the evidence. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004). In ICWA cases, the statutory basis for termination must be proved beyond a reasonable doubt. 25 U.S.C. § 1912(f); Minn. R. Juv. Prot. P. 58.03, subd. 2(b).

We begin our analysis with district court’s determination that reasonable efforts failed to correct the conditions leading to child’s placement away from father. *See* Minn. Stat. § 260C.301, subd. 1(b)(5). To terminate father’s parental rights on this statutory basis, the district court had to find that, “following the child’s placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child’s placement.” *Id.* Reasonable efforts are presumed to have failed when the child has resided out of the home for a specified period of time, the court has approved an out-of-home placement plan, and conditions leading to the out-of-home placement have not been corrected. *Id.*, subd. 1(b)(5)(i)-(iii). Relevant to this appeal, it is presumed that conditions leading to the out-of-home placement have not been corrected “upon a showing that the parent or parents have not substantially complied with the court’s orders and a reasonable case plan.” *Id.*, subd. 1(b)(5)(iii).

Father is correct that he complied with several aspects of his case plans. The district court found that father “is in compliance with many parts of his case plans,” including

also “reasonable efforts.” Because both Minn. Stat. § 260C.301, subd. 1(b)(5), and father’s argument are phrased in terms of “reasonable efforts,” we use that phraseology here to address father’s argument that the county did not show that, despite the existence of those efforts, active efforts failed to correct the conditions leading to the out-of-home placement.

obtaining stable housing; maintaining a home free of domestic violence; participating in mental-health services; completing a chemical-dependency evaluation; and taking his medication as prescribed. But the district court also found that, despite some compliance, father had failed to substantially follow his case plan. It found that father failed to submit to random drug tests, including hair follicle tests; failed to cooperate with CCSS and sign releases of information; failed to sufficiently participate in visits with child; failed to follow the recommendations of the parental-capacity evaluation, including in-home services, as well as parenting skills and anger-management classes; and failed to maintain employment.

All of these findings are supported by the evidence in the record. Testimony from the case worker and father established that father consistently refused to comply with drug tests and never completed a hair follicle test, did not regularly visit child, did not follow through with his domestic-violence classes or in-home therapy services, was not cooperative with CCSS, and struggled to maintain employment. The record also supports the district court's determination that father's noncompliance was substantial. His failure to follow through with drug testing was especially significant since, as the district court found, the initial placement of child away from father was due to social services' concern that father had chemical-dependency issues making him unable to care for child.

Thus, the district court did not clearly err by determining that the evidence proved beyond a reasonable doubt that reasonable efforts did not correct the conditions leading to child's placement outside the home. We need not address father's arguments regarding the other statutory bases relied upon by the district court because only one statutory basis is necessary to terminate parental rights. *R.W.*, 678 N.W.2d at 55.

IV. The district court did not err by finding that termination was in child's best interests.

Father finally argues that the district court erred by determining that termination of his parental rights was in child's best interests. We review the district court's determination of the best interests of child for an abuse of discretion. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 905 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

Because child is an associate member of a federally recognized Indian tribe, the ICWA best-interests standard applies. "Best interests of an Indian child" is defined by statute as

compliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe.

Minn. Stat § 260.755, subd. 2a; *see also* Minn. R. Juv. Prot. P 28.05 ("In proceedings involving an Indian child, the best interests of the child shall be determined consistent with the Indian Child Welfare Act, 25 U.S.C. sections 1901 to 1963."). The statutory definition indicates that termination is in an Indian child's best interests if the requirements of ICWA and MIFPA for a termination are met.⁴

⁴ The county's brief utilized the traditional TPR best-interests standard that applies in non-ICWA cases. To determine a child's best interests under this standard, a district court balances "(1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child." *In re Welfare of Child of A.M.C.*, 920 N.W.2d 648, 657 (Minn. App. 2018) (quotation omitted). While this three-part test originated in caselaw, it has since been incorporated into the juvenile-protection rules for TPR cases involving non-Indian

Our review of the record confirms that the requirements of ICWA and MIFPA for a termination of parental rights have been met. The district court heard the required testimony from a QEW. 25 U.S.C. § 1912(f); Minn. R. Juv. Prot. P. 28.06, subd. 2. The district court also explicitly found that the evidence supported termination beyond a reasonable doubt. Minn. R. Juv. Prot. P. 58.03, subd. 2(b). The district court next determined that CCSS made active efforts to reunite father and child and that these efforts were not successful. *See* Minn. R. Juv. Prot. P. 28.07, subd. 4(a)(1). Finally, the district court found that father’s continued custody of child “is likely to result in serious emotional damage to [child].” *See* 25 U.S.C. § 1912(f); Minn. R. Juv. P. 28.07, subd. 4(a)(2). The district court’s findings were supported by the record. Thus, the district court properly applied ICWA and MIFPA, and its decision to terminate father’s parental rights is therefore in child’s best interests.

Father, citing the congressional findings prefacing ICWA, argues that the district court improperly applied ICWA because terminating father’s parental rights rendered child “a full step farther away from her heritage.” But father does not argue that the district court incorrectly applied the requirements of ICWA in its decision to terminate father’s parental

children. Minn. R. Juv. Prot. P. 58.04(c)(2)(ii). But the rules have not incorporated this test for cases involving Indian children. And the Minnesota Supreme Court has observed that ICWA was intended to provide a remedy for a generally applicable best-interests standard that, “by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture.” *In re Custody of S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994).

rights. And, as CCSS observes, termination of father's parental rights will not affect child's enrollment status with the Tribe. We discern no error.

Affirmed.